No. 83-1922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE MENOMINEE TRIBE OF INDIANS, *et al.*,
Petitioners,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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REPLY BRIEF FOR PETITIONERS

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TABLE OF AUTHORITIES

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1. Our Petition argued that the statute of limitations in the Forest Mismanagement claim was tolled during a period of years when the Menominees, understandably relying entirely on the management of the government foresters, were blamelessly ignorant of the government's failure to cut a sufficient volume of timber in the Menominee forest (Pet. 17). We did not, as the government asserts, advance a "special tolling rule for Indian claimants" that would open the courts to a plethora of presently time-barred Indian claims. (Brief in op. at 14 n.4). Our position is not broadly based upon the Menominees' status as Indians, but, rather, is narrowly based upon

their status as beneficiaries of a *paid* trust involving *income-producing property.*[1]

In *Mitchell,*[2] this Court observed that such a beneficiary is *entitled* to rely on the trustee for management. The beneficiary would not be expected to be educated in highly technical aspects of management of a forest trust estate, and it is undisputed that the Menominees were not so educated.[3] Whether the beneficiary is Indian or non-Indian,[4] whether the trustee is the United States or a private trustee, the fact that highly technical information was available to or produced by a trust manager does not mean it is deemed to have been available to the beneficiary, or even if it was, that it constituted legal notice to the beneficiary that would bar any claim not timely made.[5] As this Court pointed out in *Mitchell,*

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[1] *See* Act of March 28, 1908, 35 Stat. 51, 3 Kapp. 317, Sec. 4 (App. 42a) which requires the Menominees to pay for the cost of government trust services. *See also* Annual Rept. of the Secretary of the Interior (1952) at 394. Statistics printed in 1940 indicate that the Tribe paid *all* costs, including "Administration and Support of Forestry" involving their mill and forest industries. Statistical Supp. to Annual Report, CIA, Fiscal Yr. ending 6-30-40, at 27, 29.

[2] *United States v. Mitchell,* 463 U.S. ——, 103 S. Ct. 2961, 2973 (1983).

[3] *See* TJ. Docket 134-67B, op. at 51, Supp. App. 237a.

[4] There are a number of instances where agencies of the United States other than the Bureau of Indian Affairs stand in the role of "trustee," including, but not limited to the Airport and Airways Trust Fund, 49 U.S.C. 1742e(1), (2); the American Printing House for the Blind Fund, 20 U.S.C. 101; various funds held and administered by the Veterans' Administration for the benefit of veterans and their families, *e.g.,* 38 U.S.C. 5205 and 31 U.S.C. 725s(a)(45); Railroad Unemployment Insurance Fund, 45 U.S.C. 358, 361 and Railroad Retirement Account and Trust Funds, 45 U.S.C. 231n.

[5] The fact that the government foresters prepared and printed the "Menominee Forest Standard Structure Analysis in 1952," did not as the government asserts, "put the Petitioners on notice of

> "A trusteeship would mean little if the beneficiaries were required to supervise the day-to-day management of their estate by their trustee or else be precluded from recovery for mismanagment." [6]

There is no real argument by the government nor did the Court of Appeals conclude that the Menominees actually knew during the period of 1952-1961 or, *by themselves* could have discovered that their forest, *completely healthy to the untrained eye*, was being harmed by severe undercutting.[7] The Court concluded, rather, that the Menominees could have discovered the wrong "if they sought advice." (Pet. App. 18a).

All we are saying is that, in a case such as this one, where, pursuant to congressional directives, the beneficiary completely and justifiably relied upon the paid trustee for technical management of the income-producing for-

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their claim of underproductivity" (Brief in op. at 12). While this highly technical study was promulgated as a working tool for the government "expert" foresters, there is no showing in the record that this material was made available to the Indians or that they would have understood its significance if it had been. While the study indicated that the annual timber harvest could be increased, it was regarded as a "preliminary step" by Defendant's Chief Forester. (*See* Supp. App. 261a). It certainly gave no indication to a layman that the forest was being severely harmed by the undercutting.

[6] 103 S. Ct. at 2973.

[7] The fact that the Menominees successfully sued the United States for ruinous *clear-cutting* of their forest in the period 1910-1928, a kind of mismanagement obvious to anyone (*see* the description of the forest in *Menominee Tribe v. United States*, 117 Ct. Cl. 442, 493-497, 91 F. Supp. 917, 924-926 (1950)) does not mean that the Menominees or the lawyers who represented them in the earlier claim (Brief in op. at 13) had any notion that the government had gone to the opposite extreme of "undercutting." Undercutting—which produces a lush-appearing but overmature and unhealthy forest—was not perceivable to anyone but a trained forester armed with detailed inventory and growth data. (*See* T.J. Docket 134-67B, Op. pp. 20-21, 37. Fdgs. 36, 37, 79). (*Supp. App.* 212a-213a, 226a, 265a-267a, 328a).

est trust asset, there is no basis for charging the beneficiary with knowledge of the trustee's wrongful conduct based upon the knowledge they might have acquired *if* they had had any inkling that the forest was being undercut and *if* they had consulted an outside expert, and *if* that consultant had been given access to the data collected by the government foresters.[8] Having paid for trust management by the United States[9] the Menominees should not have had to pay again to hire outside consultants to monitor government management of the forest—a forest that was healthy to the untrained eye.

2. The government's assertion that the claim for pretermination undercutting was beyond the jurisdiction of the Claims Court was not reached by the Court of Appeals. In any event, the jurisdiction of the court is plain under *Mitchell*,[10] since the claim is based on the 1908 Menominee Forestry Act—an Act which had as its purpose "the preservation of the forests of the Menominee Indian Reservation." (App. 41a). Its terms—requiring the employment of "skilled foresters"—evidenced Congressional intent that the forest should be managed professionally and that Congress recognized the need of trained foresters to accomplish that intent.[11] The essen-

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[8] It is submitted that had the government's standard been applied, the statute of limitations would have been tolled in few, if any, of the classic cases (*see* Pet. at 18-19) defining "unknowable" claims. In each of those cases a proper expert consulted by the plaintiff within the statutory period might have recognized the problem and exposed the negligence or other wrongdoing.

[9] *See* n. 1 *supra*.

[10] *Supra* n. 2.

[11] *See Menominee Tribe v. United States*, 117 Ct. Cl. 442 (1950), interpreting the 1908 Act as requiring the Department of the Interior when necessary "to devise some system that would bring about the desired result." (*Id.* at 499). *See also Menominee Tribe v. United States*, 391 U.S. 404, 412 (1968), where this Court interpreted the Menominee Termination Act and Public Law 280 "in accord with the overall legislative plan."

tial mismanagement complained of was failure to supply Congress with information obtained by the foresters which established that the 20 MMBF limitation on cutting was destructive of the forest: the proximate result of that mismanagement was failure of Congress to consider repeal or amendment of the limitation.

Congress had over the years shown itself amenable to amending the 1908 Act in accordance with recommendations of the BIA foresters. The BIA as trustee "had a duty to do whatever it was required to do in the circumstances to save the timber." *Oneida Tribe v. United States*, 165 C. Cls. 487, 494 (1964), *cert. den.* 379 U.S. 946. With an apparently cooperative Congress,[12] the circumstances required, at a minimum, that the BIA advise Congress of the need to amend the statute to allow a realistic cut and to justify its view with an explanation based on the data collected.[13] Damage to the Menominee Forest did not result from some failure of the Executive Branch in the ordinary legislative process, but rather followed from a failure to *implement the expressed intent*

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[12] Cf. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), cited by the government at p. 8, where the Executive Order complained of effected a plan of action which had been considered and rejected by Congress.

[13] Were this a private trust, the trustee's duty would have been to apply to a court for permission to deviate from the terms of the trust—and it would have been subject to liability had it failed to do so. (Restatement of Trusts, 2d p. 351 (19—). Such permission is granted to allow the intent of the settlor (in this case Congress) to prevail over the express terms of the trust document (in this case the 1908 Act). *Dartmouth College v. City of Quincy*, 258 N.E.2d 745 (Mass. S.Ct. 1970); *Davison v. Duke University*, 194 S.E.2d 761 (N.C. S.Ct. 1973); *Troost Avenue Cemetary Co. v. First National Bank*, 409 S.W.2d 632 (Mo. S.Ct. 1966); *In re Miller's Estate*, 230 Cal.App.2d 888, 41 Cal. Rptr. 410 (1965); *Donnelly v. National Bank of Washington*, 179 P.2d 333 (Wash. S.Ct. 1947).

of Congress in the 1908 Act, a failure to properly monitor the trust asset and provide Congress with the information it needed to assure the continued health of the Menominee Forest.[14]

But even if the government's argument had merit, it would still not wipe out that part of our claim which is based upon the negligent failure of BIA foresters to cut the proper kind of timber within the 20 MMBF limitation. (Pet. p. 12). This mismanagement could and should have been corrected soon after the BIA had completed its first inventory of the forest in 1952. Correction required no action by Congress and was in fact indicated by BIA regulations 25 CFR § 62.6 (after 1958 § 143.6), which required management of the Menominee Forest to produce the best income from a given log.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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[14] A comparison of the 1908 Act (App. F. p. 41a) with the 1910 Act, 25 U.S.C. 406, 407 involved in *Mitchell*, makes clear that the Acts are indistinguishable as bases for court jurisdiction over claims based upon federal mismanagement of Indian timber assets. If anything, the 1908 Menominee Act imposes a higher degree of trust responsibility on the United States. *Menominee Tribe v. United States*, 101 Ct. Cls. 10, 19-20 (1944).